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No. _____

In The

Supreme Court of the United States

October Term, 1996

CHARLES R. MILLER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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36 pp

I. QUESTIONS PRESENTED

1. Does a United States district court have pre-sentencing guideline discretion to offer a convicted defendant a reduced term of incarceration on condition that he agree to make immediate restitution by drawing down his pension benefits given the express anti-alienability and spousal protection and waiver provisions of the Employee Retirement Income Security Act?

2. May a United States district court, consistent with the Fifth Amendment impose an additional eight-year-period of incarceration when a convicted defendant is unable, because of his economic inability at the time of sentencing, to make immediate restitution in exchange for a reduced period of incarceration?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Charles R. Miller, Jr. respectfully prays that a writ of certiorari issue to review the final judgment entered by the United States Court of Appeals for the Sixth Circuit on July 29, 1996, timely petition for rehearing denied on September 5, 1996.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. (App. 1) The order denying petitioner's petition for rehearing with suggestion for rehearing *en banc* is unreported. (App. 11) Both decisions are reproduced in the appendix hereto.

III. JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 29, 1996. The order denying rehearing was entered on September 5, 1996. This petition for writ of certiorari was filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Employee Retirement Income Security Act of 1974 as amended

29 U.S.C. § 1055(c):

(2) Each plan shall provide that an election[of waiver] . . . shall not take effect unless –

(A)(i) the spouse of the participant consents in writing to such election, (ii) such election (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designation by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

29 U.S.C. § 1056(d):

Benefits provided under the plan may not be assigned or alienated.

V. STATEMENT OF THE CASE

On November 4, 1994 petitioner was convicted of nine counts related to bank fraud of monies from the

Citizens Bank of Cookeville, Tennessee; 18 U.S.C. § 656 (Misapplication of Bank Funds); 18 U.S.C. § 1005 (False Information on Bank Records); 18 U.S.C § 1344 (Aiding and Abetting). *United States v. Miller*, No. 2-93-00018 (M.D. Tenn.).

On January 31, 1995 petitioner appeared before the district court for a sentencing hearing. At hearing the following colloquy ensued between the district judge, petitioner and defense counsel:

> And I'm going to bargain with you, Mr. Miller. You show assets in an IRA of $462,520.76. You show a bank account of $3,266.18. You owe $32,000 in attorneys fees. *You have unencumbered assets totaling*. . . . well, your total assets are $551,000; your net worth is $518,000; Your monthly cash flow is $5,682. Now, I've give (sic) you a 15 year sentence. I'll reduce that sentence to 7 years provided you pay $100,000 within 10 days. If you don't pay the $100,000, you get the whole 15 years. *You can make restitution now*. You have the assets to do it. If you don't do it, your full sentence goes. If you do it, I'll reduce the sentence to a total of 7 years.

(Emphasis added).

As petitioner did not in fact have a total of $100,000 in "unencumbered" assets available to him to immediately satisfy the restitution "bargain" proposed by the district court, he was sentenced to 8 additional years of imprisonment. On February 2, 1995 petitioner filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1291.

On July 29, 1996 the Sixth Circuit affirmed the district court's sentencing order of 15 years even though the record before the court established that petitioner could not, at the time of sentencing, satisfy the district court's $100,000 restitution/7 years imprisonment proposal without drawing down his pension benefits covered by the express anti-alienability and spousal waiver provisions of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. §§ 1055(c) & 1056(d)(1). When petitioner could not satisfy the restitution "bargain" the district court enhanced his sentence to 15 years imprisonment which violated both ERISA as interpreted by this Court in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) as well as the Fifth Amendment of the United States Constitution which prohibits the sentencing of a criminal defendant to an enhanced term of incarceration based solely on economic inability to pay a fine or restitution as firmly and clearly established by the Court's trilogy of *Williams v. Illinois*, 399 U.S. 235 (1970), *Tate v. Short*, 401 U.S. 395 (1971), *Bearden v. Georgia*, 461 U.S. 660 (1983).

VI. REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit's Decision Directly Conflicts With an Applicable Decision of the Fourth Circuit and the Supreme Court of New Jersey Which Hold that Requiring a Criminal Defendant to Draw Down Pension Benefits in Order to Satisfy Restitution Would Violate the Express Anti-Alienability Provisions of ERISA Which this Court Previously Held Creates no Equitable Exception Even for Acts of Criminal Misconduct.

1. ERISA's Anti-Alienability Provision

On direct appeal to the Sixth Circuit the petitioner argued that the lesser sentencing option of 7 years presented to him by the district court regarding the immediate payment of $100,000 in restitution constituted an illegal sentence as it violated the anti-alienability provisions of the Employee Retirement Income Security Act of 1974 as amended (ERISA), 29 U.S.C. § 1056(d)(1) and the Court's holding in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990). ERISA provides that "each pension plan *shall provide* that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). (Emphasis added). Binding regulations promulgated by the Secretary of the Treasury further prohibit the involuntary transfer of benefits from qualified plans by requiring that "benefits provided by the plan may not be anticipated, assigned, alienated, or subject to attachment, garnishment, levy, execution or other legal or equitable provisions." 26 C.F.R. § 1.40(a)-13(b)(1). The only exceptions to the anti-alienation provisions of ERISA apply to taxes owed to the

United States, *United States v. Sawaf*, 74 F.3d 119 (6th Cir. 1996), *Shanbaum v. United States*, 32 F.3d 180 (5th Cir. 1994) and ERISA proceeds awarded to a spouse by a state court that issues a "qualified domestic relations order" in divorce proceedings for child support, alimony and division of property. 26 U.S.C. §§ 401, 414 (Tax Code); 29 U.S.C. § 1056(d)(3) (ERISA). *Ablamis v. Roper*, 937 F.2d 1450, 1454 (9th Cir. 1991).

Under *Guidry* the Court held that the imposition of a constructive trust on a *convicted* union official's pension benefits violated the anti-alienability provisions of ERISA, 29 U.S.C. § 1056(d)(1) noting that it is not "appropriate to approve *any generalized exception* either for employee malfeasance or for criminal misconduct to ERISA's prohibition on the assignment or alienation of pension funds." *Guidry, supra* at 376. (Emphasis added) *See also, Patterson v. Shumate*, 504 U.S. 753 (1992) (denying inclusion of ERISA pension benefits in a bankrupt estate).

The issue presented to the Court is an important question of federal law regarding the appropriate interplay between congressional policy to protect pension benefits under ERISA from alienation and the sentencing power of the courts to impose monetary fines and restitution orders in criminal cases in order to compensate victims of crime. In *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995), the defendant entered a plea agreement which called for a 21 month sentence and a recommendation that the sentencing court order restitution. The district court conditioned acceptance of the plea agreement upon defendant providing restitution from his ERISA plan by requiring him to liquidate his pension fund in order to

make immediate restitution. Relying on *Guidry* the *Smith* court reversed:

> In the case at hand the Government attempted to draw down his benefits due under the plans as a lump sum and turn it over intact as restitution. Upon discovering that Smith was eligible for lump sum benefits as they are paid to him. . . . The government should not be allowed to do indirectly what it cannot do directly; it cannot require Smith to turn over his lump sum distribution, nor can require him to turn over his benefits as they are paid to him directly." Understandably, there may be a natural distaste for the result we reach here. The statute, however is clear.", 493 U.S. at 377. . . . The restitution order in this case clearly required Smith to relinquish his pension benefits. The district court stated, "Well, he will be paying amounts, or pension [sic] and, once those sums are in his hands, it seems to me that they are subject to the existing order of this court announced today." That approach is impermissible. Smith cannot be forced to relinquish his ERISA benefits for restitution.

Id. at 684.

Without reasoned analysis the Sixth Circuit summarily disposed of this important question of law regarding the power of a sentencing court to reach ERISA pension benefits to satisfy a court imposed fine or restitution order in three short conclusory paragraphs even though this Court held in *Guidry* that ERISA clearly created no equitable exception for criminal misconduct:

Finally, we turn to defendant's sentence, which is based on statutes in effect prior to the enactment of the Sentencing guidelines. The first issue raised by defendant involves a bargain proposed by the district court: if defendant paid $100,000 in restitution within ten days, his sentence would be reduced from fifteen to seven years of imprisonment. According to defendant, this proposal represented an illegal sentence because the only possible source from which the money could be obtained was his pension benefits.

Before addressing the technical aspects of this contention, we note that such bargains are generally ill-advised because they *discriminate* in favor of individuals with assets. While the district court has an understandable interest in helping the victims of crime to obtain restitution, in doing so it must not appear that one can simply buy one's way out of punishment that would befall a less affluent defendant. This kind of concern was one impetus behind adoption of the Federal Sentencing Guidelines and we recognize that this type of scenario will not arise in prosecutions of crimes committed since their enactment.

Despite these policy reservations, the proposal offered by the district court does not, contrary to defendant's contentions, represent an illegal sentence. Although the court referred to defendant's individual retirement account in calculating his unencumbered assets it did not specify that the restitution be paid from those funds and thus the sentence does not run afoul of either the anti-alienability provision of

ERISA, 29 U.S.C. § 1056(d)(1), or *Guidry v. Sheet Metal Workers National Pension Fund,*

493 U.S. 365 (1990).

(App. 9) (Emphasis added)

The Sixth Circuit's decision misapprehends both the facts and the applicable provisions under ERISA. In doing so it disregarded the Court's holding in *Guidry, supra* at 377, that shields ERISA pension funds from alienation even for acts of criminal misconduct, and simply ignored the Fourth Circuit's well reasoned opinion in *United States v. Smith, supra.* Accord, *State v. Pulasty,* 642 A.2d 1392, 1393-94 (N.J.1994) (ERISA anti-alienability provision prohibits restitution drawn down from protected pension benefits). Cf., *United States v. Gaudet,* 966 F.2d 959, 963-64 (5th Cir. 1992) (Not plain error for district court to order restitution from protected ERISA pension benefits).

In rejecting petitioner's anti-alienability argument the Sixth Circuit placed undue reliance on the district court's failure to "specify that the restitution be paid" from his pension benefits funds, notwithstanding that the source for retrieving the total amount required of the petitioner to seal the "ill-advised" sentencing "bargain", could *only* be satisfied by drawing down his pension benefits. The district court pre-conditioned the imposition of the lesser sentence on petitioner making an immediate payment of $100,000 payment within ten days. The district court noted that petitioner had *"unencumbered"* assets totaling $551,000 of which $462,520.76 represented funds in pension benefits. That left petitioner with only $88,479.24 in non-pension fund assets to apply towards

the district court's proposed $100,000 restitution "bargain." The district court had full disclosure of petitioner's assets from the presentence report, and was aware that the only conceivable way he could satisfy the "generally ill-advised" bargain was by drawing down his pension benefits, a sentencing approach that is "impermissible" under *Guidry* as interpreted by the Fourth Circuit in *United States v. Smith* and by the Supreme Court of New Jersey in *State v. Pulasty*.

2. ERISA's Spousal Protection and Waiver Provisions

The district court's restitution proposal is clearly impermissible under a separate provision of ERISA which was not before the Court in *Guidry*. At the time of the sentencing hearing petitioner only had $88,479.24 in unencumbered assets available to him. Under ERISA, 29 U.S.C. § 1055(c) petitioner was not free to liquidate his pension benefits to apply towards the $100,000 restitution bargain proposed by the district court absent his wife's specific and valid written waiver of her federally protected legal interest in ERISA protected retirement benefits. *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993); *Hurwitz v. Sher*, 982 F.2d 778, 780-783 (2d Cir. 1992); *Pedro Enterprise v. Professional Administrators*, 998 F.2d 491, 494 (7th Cir. 1993); *Ablamis v. Roper*, 937 F.2d 1450, 1454-1455 (9th Cir. 1991).

In 1984 Congress amended ERISA by enacting the Retirement Equity Act (REA), Pub.Law 98-397, 98 Stat. 1426, to afford greater protection to women who worked in the home and contributed significantly to the family's

financial security by insuring that they would be provided the ability to obtain pension benefits upon their husband's death or divorce. Pension Equity For Women: Hearings on H.R. 2100 before the Sub.Comm. on Labor-Management Relations of the Committee on Education and Labor, 98th Cong., 1st Sess. 26 (1983). *See*, S. Rep. No. 575, 98th Cong., 2d Sess. 12, reprinted in 1984 U.S. Cong. & Ad. News 2547, 2558. *Heisler v. Jeep Corp.*, 807 F.2d 505, 509 (6th Cir. 1986) (ERISA amended to eliminate inequities "by providing for automatic survivor benefits to spouses of vested participants in order to better afford protection to women dependent on their husband's earnings and at the mercy of death and divorce").

REA specifically affords protection to spouses by requring pension benefit plans to provide for automatic survivor benefits. Once a participant becomes vested under the benefit plan, and has earned a vested nonforfeitable right to any portion of the accrued benefit, the spouse is assured of receiving a survivor's annuity on the participant's death, at least 50% of the decedent's benefit. The spouse's right to a survivor's annuity may be waived only if the non-participant agrees in writing which must be notarized or executed in the presence of the plan administrator. 29 U.S.C. § 1055(c).

Furthermore, under Tennessee law pension benefits are not "owned" by a married retirement plan participant as separate property but are jointly owned by a husband and wife as part of the marital estate. *Batson v. Batson*, 769 S.W.2d 849, 857 (Tenn.App.1988). Nor is Tennessee law preempted by REA as it is a "state law of general application with only a 'tenuous' effect on an ERISA plan." *Retirement Fund Trust v. Franchise Tax Bd.*, 909 F.2d 1266,

1274 (9th Cir. 1990) (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

At the time the sentencing "bargain" was proposed by the district court, petitioner did not have the unilateral power under ERISA and Tennessee law to draw down monies from his pension benefits, absent his wife's written waiver and consent. Congress enacted REA to recognize "the statutes of marriage as an economic partnership" and to "improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents." S.REP. No. 575 at 1, *reprinted in* 1984 U.S.Cong. & Admin. News at 2547. The "equity" concerns embodied in REA were to insure and safeguard the provision of benefits to spouses and dependents reliant upon the employee for support which in most cases is the single largest asset of the family. Solomon, *Beyond Preemption: Accommodation of the Non-Employee Spouse Under ERISA*, 31 HASTINGS L.J. 1021, 1021 (1980).

It is clear that the petitioner cannot be punished further by having to serve an additional 8 years of incarceration solely for a legislative enactment of a considered policy choice expressly mandated by Congress designed to protect spouses from the erosion of their marital and federally protected interest in ultimately receiving ERISA pension benefits. ERISA unambiguously reflects congressional policy to safeguard pension income for plan participants and their dependents, even though it prevents third parties such as victims of crime from securing restitution for the harms done to them. *Guidry, supra* at 376. To permit a criminal court to reach protected pension benefits as was attempted here would defeat congressional

policy to ensure that spouses and dependents of plan participants share in pension benefits accumulated during the marriage. *See generally,* Mansur, *ERISA Preemption, Community Property, and the Non-Employee Spouse: A Study in Confused Equities,* 30 HOUSTON L. REV. 1695, 1720-1727 (1993).

Accordingly, the harsher sentence imposed by the district court must be vacated and remanded for resentencing as the relevant information before the sentencing court was applied without due regard for the factors appropriate to the proposed sentencing bargain by "improper considerations . . . in determining the sentence." *United States v. Derrick,* 519 F.2d 1, 3 (6th Cir. 1975).

B. The Sixth Circuit's Judgment was Rendered in a Manner that Conflicts with Applicable Decisions of this Court Which Prohibit a Sentencing Court Under the Fifth Amendment from Imposing an Enhanced Term of Imprisonment on a Defendant Based Solely on his Inability to Make Immediate Restitution.

The enhanced sentence of 8 additional years imprisonment actually imposed by the district court is unconstitutional as petitioner did not have sufficient funds available to him at the time of sentencing to immediately satisfy the $100,000 restitution "bargain" as the only possible source of the $100,000 was $88,479.24 in unencumbered assets with the remaining $11,520.76 shortfall coming from his pension benefits. While rejecting petitioner's ERISA argument the Sixth Circuit nonetheless squarely framed the constitutional issue before

this Court by observing "that such bargains are generally ill-advised because they *discriminate in favor of individuals with assets* . . . " it nonetheless held that "the [district court] . . . did not specify that restitution be paid from those [pension] funds. . . . " (App. ___) (Emphasis added).

It is true that the district court "did not specify that restitution" was to be made from petitioner's pension funds. Nonetheless, the pre-sentence report reviewed by the district court when it presented the sentencing "bargain" to the petitioner in open court, established that he lacked sufficient assets available to him to immediately and fully pay the $100,000 in restitution in exchange for an 8 year lesser term of imprisonment unless the petitioner was to draw down pension fund assets which under ERISA he could not do absent his wife's written consent *See, United States v. Voda*, 994 F.2d 149, 155 (1st Cir. 1993) (a defendant can rely on the PSR to establish his inability to pay).

Thus, the $100,000 restitution "bargain" offered to the petitioner by the district court discriminates against those class of convicted defendants with insufficient resources "to simply buy one's way out [of prison] that would befall a less affluent defendant." (App. 9). Beyond the Sixth Circuit's expressed "policy reservation" discrimination based on economic status clearly implicates the Due Process Clause of the Fifth Amendment. While economic disadvantage is not a suspect classification, [*United States v. Luster*, 889 F.2d 1523, 1527 (6th Cir. 1989)], this Court has consistently instructed, in a clear line of unbroken decisions, sentencing courts to "squint hard at any [state action] that deprives a man of his liberty, his right to remain free" based solely on one's

inability to pay a fine. *Williams v. Illinois*, 399 U.S. 263, 263 (1970).

The Court's trilogy of *Williams v. Illinois, supra, Tate v. Short*, 401 U.S. 395 (1971) and *Bearden v. Georgia*, 461 U.S. 660 (1983) when applied to this case require this Court to invalidate the enhanced sentence imposed by the district court as violative of the Fifth Amendment. In *Williams v. Illinois, supra* at 263 the Court held that the Equal Protection Clause prohibits the state from incarcerating a defendant for a longer period of imprisonment because of his inability to pay by converting a fine into imprisonment, thereby working an "invidious discrimination on the basis of economic status." *Williams* is followed by *Tate v. Short, supra* at 397-398, where the Court held that a sentencing court could not subject a defendant to imprisonment when the sentencing statute provided that a fine was the only permissible penalty for those individuals able to pay. The Court held that this sentencing practice constituted the same invidious discrimination as the unconstitutional defect in "*Williams* also adheres in *jailing an indigent for inability to pay a fine.*" *Id.* Finally in *Bearden v. Georgia, supra* at 672 the Court held that it was fundamentally unfair under the Due Process Clause for the state to revoke a defendant's probation and imprison him based *solely on his non-willful failure to pay a fine or restitution.*

Although the precise factual backdrop presented herein has never been considered by this Court, the Fifth Circuit invalidated a sentencing statute that required a defendant to pay a fine immediately or suffer incarceration. *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1976). The *Frazier* court held a sentencing statute unconstitutional as

it creates two disparately treated classes: those who [can] satisfy a fine immediately and upon its levy, and those who can only pay over a period of time. *Id. See also, Barnett v. Hopper*, 548 F.2d 550, 553 (5th Cir. 1977), *vacated as moot*, 439 U.S. 1041 (1978) (once court determines that incarceration is inappropriate and that a fine would suffice, imprisonment could not then be imposed based on inability to pay that fine).

Recently, the Ninth Circuit held that a U.S. Sentencing Guideline as applied to the sentence imposed on the defendant violated the "fundamental fairness guaranteed by the Due Process Clause of the Fifth Amendment." *United States v. Parks*, 89 F.3d 570 (9th Cir. 1996). In *Parks*, the district court added an additional eight months to his sentence under the Guidelines because he was still under sentence of a legal financial obligation of a state court to pay a fine at the time he committed the federal offense. The *Parks* court vacated the sentence under *Williams, Tate* and *Bearden* as the defendant "may be receiving an additional eight months on this sentence due to poverty. Such a result is anathema to the Constitution." *Id.* at 573. *See also, United States v. Hines*, 88 F.3d 661, 664 n.4 (8th Cir. 1996) (to impose as a condition of supervised release the immediate payment of a fine if the defendant's ability to pay is based upon post-supervised release income violates the Sentencing Guidelines and *Bearden v. Georgia*); *Lincoln v. United States*, 12 F.3d 132, 133 (8th Cir. 1993) (*Bearden* constitutional safeguards protect indigent defendant at the time enforcement proceedings as individual cannot be punished by incarceration based on inability to pay fine).

The financial information contained in petitioner's pre-sentence report reviewed by the district court establishes that the proposed sentencing "bargain" would have required the petitioner to spend down his pension benefits in order for him to turn over $100,000 in restitution within 10 days of sentencing as pre-conditioned by the court. Without more, the Sixth Circuit recognized that such sentencing bargains are "generally ill-advised" because they discriminate in favor of defendants with sufficient assets to meet an immediate restitution order. While the sentencing "bargain" is certainly "ill advised", the enhanced term of imprisonment from 7 to 15 years actually imposed by the district court was based solely on petitioner's inability to pay $100,000 in restitution within 10 days of sentencing and for no other reason, and is therefore unconstitutional under the Fifth Amendment. Once the district court made a judicial determination that a term of 7 years of imprisonment plus restitution was an appropriate alternative sentence, it could not, consistent with fundamental fairness and equal protection as embodied in the Fifth Amendment, impose the sentence of an additional 8 years when petitioner lacked sufficient resources to make immediate restitution within 10 days. Petitioner's inability to pay the full amount forthwith or suffer an enhanced term of incarceration of 8 additional years is anathema to the Constitution as it is clear that petitioner's economic status was the sole basis for the sentencing court's imposition of the 15 year term of imprisonment.

Finally, it should not go unnoticed by this Court that at the time of his sentencing the petitioner had a fixed "monthly cash flow of $5,628." With that amount of

money available each month combined with other non-ERISA assets belonging to the petitioner, it is evident that the sentencing court had a number of other available methods to it for requiring restitution as an alternative to the immediate payment of $100,000 in exchange for a lesser period of imprisonment. As noted by the Fifth Circuit in *Frazier*:

> [w]e hold that the penal and deterrent effect of the immediate fine may be achieved through the alternative device of installment payments, appropriately calculated and perhaps through other measures which the [sentencing courts] in their wisdom, may devise. Imprisonment of those who cannot pay their fines immediately is not necessary to promote the state's compelling interest in effective punishment and deterrence of crime.

457 F.2d at 730.

The constitutional defects condemned in *Williams*, *Tate* and *Bearden* are apparent here as this petitioner suffers from invidious discrimination in violation of the Fifth Amendment where a wealthier defendant could have made full restitution. The district court's sentence of 8 additional years of imprisonment was imposed on petitioner because he did not have $11,520.76 in available unencumbered assets to satisfy the $100,000 restitution proposal, a result clearly condemned by *Williams* and its progeny. From these decisions several fundamental principles emerge: courts must exercise greater sentencing scrutiny that affect indigents in a manner which does not discriminate and punish based solely on inability to pay;

any disparate treatment in sentencing cannot be arbitrarily imposed solely on economic status, particularly where adequate alternatives to achieve the same objective are readily available. The enhanced sentence of 8 addition years imposed on petitioner does violence to these principles.

VII. CONCLUSION

For the foregoing reasons the petitioner prays that a writ of certiorari issue to review the decision of the Sixth Circuit and vacate the decision below and remand for resentencing in a manner consistent with ERISA and the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

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October 17, 1996

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VIII. *APPENDIX*

1. Opinion, *Miller v. United States*, No. 95-5298 (6th Cir. filed July 29, 1996).....App. 1

2. Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc, *United States v. Miller*, No. 95-5298 (6th Cir. September 5, 1996).....App. 11

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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NOT RECOMMENDED FOR PUBLICATION

No. 95-5298

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee,** v. CHARLES R. MILLER, JR. **Defendant-Appellant.**	) **ON APPEAL** FROM THE) UNITED STATES) DISTRICT COURT FOR) THE MIDDLE DISTRICT) OF TENNESSEE) **OPINION**) (Filed July 29, 1996)

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; WELLS, District Judge.*

PER CURIAM. Defendant, Charles R. Miller, Jr., challenges his conviction for various counts related to bank fraud. After careful consideration of both the record and the arguments advanced by defendant, we conclude that

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* The Honorable Lesley Brooks Wells, United States District Judge for the Northern District of Ohio, sitting by designation.

his contentions of error are misplaced. We therefore affirm both his conviction and his sentence.

I.

The issues raised in this appeal do not require a recitation of the facts. In the few instances where background information is necessary, it will be supplied in the context of our discussion of the legal issue.

1. Pre-Indictment Delay

Defendant first contends that his Fifth Amendment right to due process was compromised by the seven years that elapsed between the commission of the alleged crimes and the return of the indictment.

The Supreme Court has recognized that the Due Process Clause of the Fifth Amendment plays but a limited role in protecting against pre-indictment delay. *United States v. Lovasco,* 431 U.S. 783, 789 (1977). This circuit has read *Lovasco* to require a two-part showing by a defendant alleging that such a delay adversely affected his right to due process. First, the delay must have caused substantial prejudice to his right to a fair trial. Second, he must demonstrate that the government intentionally used the delay to gain a tactical advantage. *United States v. Brown,* 959 F.2d 63, 66 (6th Cir. 1992).

Defendant recognizes that his burden is substantial and therefore urges us to modify the second prong of the *Brown* test to include negligent conduct on the part of the government in bringing an indictment. *See United States v. Copley,* 774 F.2d 728, 730 n. 2 (6th Cir. 1985) (dictum), *cert.*

denied, 475 U.S. 1049 (1986). Defendant's argument is unpersuasive. As the Court recognized in *Lovasco*, encouraging a rush to indictment would have the deleterious effect of increasing the likelihood of unwarranted charges being filed and would add to the time during which defendants stand accused but untried. 431 U.S. at 791. Moreover, such a requirement would make it overly difficult for prosecutors to develop cases, such as the one now before us, that involve more than one participant. 431 U.S. at 792-93. Thus, both the government and innocent defendants stand to lose substantially if the prosecution feels that it must seek an indictment at the first opportunity or risk having the charges dismissed as stale. As *Lovasco* makes clear, the applicable statutes of limitation remain a defendant's primary protection against preindictment delay. 431 U.S. at 789.

Miller maintains that he suffered actual prejudice due to a fading memory, a missing witness, loss of crucial documents, and deposition testimony that he gave in the interim. As we have previously observed, dimming memory alone is insufficient to establish prejudice. *See United States v. Duncan*, 763 F.2d 220, 222 (6th Cir. 1985). Moreover, the district court, which had an opportunity to observe defendant's testimony, found that "the memory of witnesses was not materially impaired."

As for the missing documents and absent witness, defendant has failed to show how their absence prejudiced his cause. Not only do they go to tangential issues, it appears from the record that the relevant information could have been established by other means.

Finally, though we need not reach the second prong of the *Brown* test, we note that defendant has not even alleged that the government engaged in use of the pre-indictment delay for tactical reasons, which is presumably why he urged this court to adopt the less onerous negligence standard.

In sum, we hold that defendant has failed to establish either prejudice or impermissible motive on the part of the government and thus failed to make out a viable due process claim.

2. *Admissibility of an Audiotape*

Defendant next takes issue with the district court's decision to admit into evidence a tape recording made by John Meatte, an indicted co-conspirator who pleaded guilty prior to defendant's trial. During the period when the illegal activity allegedly occurred, Miller and Meatte acted as presidents of Citizens Bank and Commonwealth Industries, Inc., respectively. The indictment charges that the two men, along with other confederates, engaged in a prolonged conspiracy to defraud Citizens Bank.

Without revealing the fact, Meatte made the tape at issue while talking to defendant on the telephone. It consists of approximately one minute of a thirty minute conversation. Defendant filed a motion in limine to exclude it as untrustworthy and violative of 18 U.S.C. § 2511(2)(d). Intercepting communications "for the purpose of committing any criminal or tortious act" violates § 2511(2)(d), and evidence of such an interception is not admissible under 18 U.S.C. § 2515.

During the evidentiary hearing held to resolve the matter, Meatte testified that he made the recording not as blackmail but as "insurance" regarding the terms of certain promised loans to Commonwealth. He went on to explain that the details of the loans were complicated and that a primary reason for the recording was so that he could make sure that the loans were made out in the correct amounts.

This court has observed that "when the purpose of an interception is to make or preserve an accurate record of a conversation in order to prevent future distortions by a participant, the interception is legal." *United States v. Underhill*, 813 F.2d 105, 110 (6th Cir.), *cert. denied*, 482 U.S. 906 (1987). We review the district court's determination that a proffered tape was made for a legitimate purpose for clear error. *Traficant v. Commissioner*, 884 F.2d 258, 266 (6th Cir. 1989). Furthermore, the burden rests with the party seeking to exclude the tape to prove that it was made for an impermissible purpose. *Id.* In this case, the testimony at the hearing supports a view that, while Meatte may have sought to protect his own interest, he did not do so with either criminal or tortious intent.[1]

We likewise reject defendant's contention that the district court abused its discretion in admitting the tape

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[1] We note in passing that, had the tape been made in furtherance of the conspiracy to defraud, defendant would not, as a co-conspirator, be entitled to invoke the protection of 18 U.S.C. § 2511(2)(d). *Underhill*, 813 F.2d at 112; moreover, this circuit recognizes a "clean hands" exception to 18 U.S.C. § 2515. *United States v. Murdock*, 63 F.3d 1391, 1404 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

because it lacked the proper indicia of trustworthiness. *See United States v. Scarborough*, 43 F.3d 1021, 1024 (6th Cir. 1994); *United States v. West*, 948 F.2d 1042, 1044 (6th Cir. 1991) (declaring taped conversations admissible unless incomprehensible portions render them untrustworthy as a whole), *cert. denied*, 502 U.S. 1109 (1992). In this case, defendant's argument is not that the tape is inaccurate but that it does not contain the entire conversation. Meatte testified as to how and why he made the recording. Given that the tape represented an accurate, unedited recording of that brief portion of their conversation, we cannot conclude that the trial court abused its discretion in permitting its introduction.

3. Jury Instruction

Defendant requested that the district court charge the jury with the entire language of 18 U.S.C. § 1005. The court declined because the statute includes four ways in which an individual can violate the statute. In this case, defendant was charged with making or causing false information to be recorded on the books and records of Citizens Bank, a violation that cannot be sanitized by the approval of the board of directors.

We affirm the reasoning of the district court on this issue.

4. Allen Charge

It is beyond dispute that this case was closely contested. An earlier trial ended in a hung jury; and, after two days, the jury in the second trial sent a note to the

court that it was deadlocked. In response, the district court chose to give an *Allen* charge.

Defendant does not quarrel with the substance of the charge and also concedes that the decision to give such an instruction rests within the sound discretion of the trial court. Rather, he argues that the timing resulted in coercion, coming as it did after ten days of trial and two days of deliberation.

While we have cautioned courts contemplating an *Allen* charge to take heed that the instruction not be coercive, *see, e.g., In re Ford*, 987 F.2d 334, 340 (6th Cir.), *cert. denied*, 506 U.S. 862 (1992), we have never held that the mere timing of an otherwise properly worded charge can render it *per se* coercive. In this case, the *Allen* charge tracked language explicitly approved by this court. *See United States v. Clark*, 988 F.2d 1459, 1468 (6th Cir.), *cert. denied*, 114 S. Ct. 105 (1993). Furthermore, we find defendant's related contention that the district court interjected itself into the trial in such a way as to aid the government utterly unsubstantiated by our review of the record.

5. Supplemental Instructions

During the second day of deliberations, the jury sent a request to the court: "Please provide to the jurors a clearer explanation of the role 'intent' plays in our decision making process. Is *intent* to be the main point or the method by which he carried out the transactions being considered."

In response the trial judge reread the jury the elements of bank fraud, misapplication of bank funds, and

false entry, as well as the standard Sixth Circuit instruction on state of mind. The court declined defense counsel's request to repeat the good faith portion of the instruction, noting that the jury had already been given the charge and could reread it.

This court reviews the manner in which the district court responds to jury questions for abuse of discretion. *United States v. August*, 984 F.2d 705, 712 (6th Cir. 1992), *cert. denied*, 114 S. Ct. 158 (1993). We have observed that, "When a jury indicates confusion about an important legal issue, it is not sufficient for the court to rely on more general statements in its prior charge." *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989).

However, defendant does not argue that the court should have given the jury a more precise definition of intent. Rather, he simply believes that all of the earlier instructions, including the good faith instruction, should have been given. In our view, the instructions repeated by the district court properly responded to the question posed by the jury and did not emphasize the government's case to defendant's prejudice.

6. Sentencing

Finally, we turn to defendant's sentence, which is based on statutes in effect prior to the enactment of the Sentencing Guidelines. The first issue raised by defendant involves a bargain proposed by the district court: if defendant paid $100,000 in restitution within ten days, his sentence would be reduced from fifteen to seven years of imprisonment. According to defendant, this proposal represented an illegal sentence because the only possible

source from which the money could be obtained was his pension benefits.

Before addressing the technical aspects of this contention, we note that such bargains are generally ill-advised because they discriminate in favor of individuals with assets. While the district court has an understandable interest in helping the victims of crime to obtain restitution, in doing so it must not appear that one can simply buy one's way out of punishment that would befall a less affluent defendant. This kind of concern was one impetus behind adoption of the federal Sentencing Guidelines and we recognize that this type of scenario will not arise in prosecutions of crimes committed since their enactment.

Despite these policy reservations, the proposal offered by the district court does not, contrary to defendant's contentions, represent an illegal sentence. Although the court referred to defendant's individual retirement account in calculating his unencumbered assets, it did not specify that the restitution be paid from those funds and thus the sentence does not run afoul of either the anti-alienability provision of ERISA, 29 U.S.C. § 1056(d)(1), or *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990).

The second contention of error involves a release from Citizens Bank to defendant, his wife, and the trustee of his bankruptcy estate, renouncing all claims against them. Defendant raised the issue by way of a Fed. R. Crim. P. 35(c) motion to correct an illegal sentence, arguing that the court's order of restitution to Citizens Bank

in the amount of $8,881,763.69 was illegal in light of the release.

While we agree with the parties that the district court had jurisdiction to entertain the motion, remand is not required because it is clear from the record that, even had the district court considered the release, it could still have imposed the order of restitution. Simply put, an order of restitution imposed in the wake of a criminal conviction does more than simply satisfy a monetary dispute between two parties: it also contains a punitive element designed to deter such conduct. *See generally Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986). Furthermore, there is nothing in the record to indicate that defendant paid any money to Citizens Bank in exchange for the release and thus double recovery – in the unlikely event that the entire $8,881,763.69 is ever repaid – is not at issue.

For the foregoing reasons, the conviction and sentence are hereby **affirmed.**

No. 95-5298

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	ORDER (Filed Sept. 5, 1996)
v.	)	
CHARLES R. MILLER, JR., Defendant-Appellant.	)	

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and WELLS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Lesley Brooks Wells, United States District Judge for the Northern District of Ohio, sitting by designation.